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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No._____

In the Matter
of

INDEPENDENT ICE & COLD STORAGE COMPANY, INC., and DAN ARIAS,

Petitioners,

vs.

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor (ARTHUR J. GOLDBERG, Secretary of Labor, substituted as a party appellant in the place and stead of James P. Mitchell, resigned),

Respondent.

(Two Cases)

Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

DECISIONS OF THE COURTS BELOW

This Petition for Writ of Certiorari arises out of the decision of the United States Court of Appeals for the Fifth Circuit in two cases which were consolidated for purposes of appeal to that Court. The Court of Appeals reversed the judgments of the United States District Court for the Southern District of Florida, Tampa Division, in which District Judge George W. Whitehurst held that the question of coverage by the

Fair Labor Standards Act of the employees for whose benefit the actions were brought by the Secretary of Labor involved issues of law which had "not been settled finally by the courts" within the meaning of Section 16(c) of the Act, as amended in 1949. The opinion of the Court of Appeals is reported at F.2d , and is appended at page A-1 of the Appendix to this petition. The opinion and judgments of the District Court are reported at 183 F. Supp. 636, and appear at pages 45 to 51 of the Transcript of Record printed for use of the court below.

Grounds of Jurisdiction

The jurisdiction of this Court may be acquired by writ of certiorari, and the time for filing this petition has not expired[1]. The opinion of the Court of Appeals was dated August 16, 1961 (Appendix, page A-1), and the judgment of said Court was recorded in its minutes on said (Transcript of Record, p. 65).

No petition for rehearing was filed in the Court of Appeals, and no application was made for an order extending time within which to file petition for writ of certiorari, although orders were entered staying return of mandates to the District Court (Transcript of Record, p. 70, 75).

Jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C 1254 (1), and the discretionary powers established by Rule 19.1(b) of The Supreme Court Rules.

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[1]Rule 22.3, Supreme Court Rules; 28 U.S.C. 2101(c)

Questions Presented for Review

QUAERE I.

HAS IT BEEN "SETTLED FINALLY BY THE COURTS" THAT THE EXCURSION OF A FISHING VESSEL INTO EXTRATERRITORIAL WATERS AND RETURN TO THE POINT OF DEPARTURE, WITHOUT TRADE OR EXCHANGE EN ROUTE, IS "COMMERCE" WITHIN MEANING OF THE FAIR LABOR STANDARDS ACT?

QUAERE II.

HAS IT BEEN "SETTLED FINALLY BY THE COURTS" THAT SALE OF RELATIVELY INSIGNIFICANT QUANTITY OF ICE USED TO PREVENT SPOILAGE IN ONE STAGE OF PROCESSING SHRIMP BY A LOCAL MERCHANT IS "CLOSELY RELATED (AND) DIRECTLY ESSENTIAL" TO THE PRODUCTION OF SHRIMP WITHIN MEANING OF THE ACT?

The Court of Appeals decided these questions without regard to the limitations imposed by Section 16 of the Fair Labor Standards Act, as amended in 1949. By amendment in that year, a new method of enforcement of the Act was added to the existing methods provided under that section by the adoption of subparagraph (c), permitting the Secretary of Labor to bring an action to recover the amount claimed by any employee under Sections 6 and 7 of the Act "Provided, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled."

The issues of law involved in the foregoing questions have never been decided by any court; and no court has interpreted the pertinent provisions of the Act to extend coverage under similar circumstances or has applied the Act to a factual situation even remotely resembling those involved, since the drastic amendments of 1949. And, yet, even though the construction of the Act as amended in 1949 presented pure questions of law as to which no court had ever reached a decision and which were decisive of the issue of coverage, the Court of Appeals disregarded the limitations set out in Section 16 and its lack of jurisdiction under the terms thereof, and decided the questions of law as matters of first impression. The Court of Appeals, therefore, *assumed* a jurisdiction which the District Judge had expressly decided that he did not possess under the requirement expressed in the Act.

Statutory Provisions

The pertinent provisions of the Fair Labor Standards Act, Act of June 25, 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U.S.C. 201 et seq., controlling these actions, are as follws:

SEC. 3. As used in the Act—

* * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * *

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities,

merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * *

"SEC 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than $1 an hour;

* * *

"SEC. 16.***

(c)*** When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled."

STATEMENT OF THE CASE

The District Court took jurisdiction of the cases in the first instance under the provisions of Section 16 of the Fair Labor Standards Act providing that "The Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim", and 28 U.S.C. 1337, providing that "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce."

The facts are not in dispute. The corporate petitioner maintains a plant in Tampa, Florida, for the manufacture of artificial ice, and sells and delivers its product solely within the boundaries of the city (Transcript of Record 48-49). The plant is operated in a normal and conventional manner, the ice being sold from its platform (Transcript of Testimony 176) on commercial routes (Transcript of Testimony 181), and through some 35 to 40 substations or cubed-ice boxes owned by the company (Transcript of Testimony 171-172,180-182,185). In addition to these sales, the company sells an average of approximately 7,000 tons of ice per month to shrimp boats berthing in the City of Tampa (Transcript of Testimony 137). Each of these boats takes from 25 to 32 tons of ice in embarking upon an excursion to the fishing grounds in international waters of the Gulf of Mexico (Transcript of Testimony 33). The ice is put through a blower which crushes it and sprays it into the hold of the vessel (Transcript of Record 46). All of this ice is consumed in the voyage, and none of it is transported into any other state of the United States or into any foreign country (Transcrip of Record 46-47). When the vessel returns to the docks in Tampa, the supply of ice is exhausted and the

shrimp are sold to local packing houses (Transcript of Record 46,47).

As to this ice, it is claimed by the Respondent that the excursion into international waters and return to the City of Tampa is "commerce" within the meaning of Section 3(b) of the Fair Labor Standards Act, as that meaning has been "settled finally by the courts," and consequently that manufacture of the ice is "production of goods for commerce" within the meaning of Section 3(j) of the Act.

Additionally, Independent Ice & Cold Storage Company, Inc., sells four or five tons of ice "just about" every day to Ocean Products Company, one of the shrimp packing houses located in the City of Tampa (Transcript of Testimony 78). This purchase merely supplements the ice made by Ocean Products Company for its own purposes (Transcript of Testimony 89). The ice is cracked and sprinkled on the shrimp while it is on the graders and on the peeling tables to reduce the temperature of the shrimp and to prevent spoiling (Transcript of Record 49). This ice is consumed entirely in such use and does not accompany the shrimp to the packing room where it is subsequently placed in boxes and then dispatched to the freezer (Transcript of Record 49). A large percentage of the shrimp as finally packed and frozen is thereafter transported in interstate commerce by Ocean Products Company (Transcript of Record 49).

It is contended by Respondent that the manufacture of this ice is a "closely related . . . occupation directly essential to the production" of shrimp for interstate commerce within the meaning of Section 3(j) of the Act, as that meaning has been "settled finally by the courts."

ARGUMENT

It is submitted that the Court should exercise its discretion and grant Petition for Writ of Certiorari in these cases for the following reasons:

1. Section 16(c), of the Fair Labor Standards Act, adopted as an amendment to the Act in the year 1949, has never been construed by this Court, and specifically, the proviso contained in said section precluding the Secretary of Labor from instituting any action in behalf of an employee if such action involves "an issue of law which has not been settled finally by the Courts," has never been construed by this Court, and has no corollary in other legislation; and in view of the vast number of cases being filed by the Secretary in behalf of employees involving novel questions of law, the construction of said section and the proviso thereof constitutes an important question of federal law which has not been, but should be, settled by this Court.

2. The Court of Appeals of the Fifth Circuit has decided in these cases a federal question in the construction of Section 3(j) of the Fair Labor Standards Act, and specifically, the words "or in any closely related process or occupation directly essential to the production" of goods in a way in conflict with the decision of this Court in the case of *Mitchell v. Zachry Co.*, 362 U.S. 310, 80 S. Ct. 739, 4 L ed 2d 753, in that the Court of Appeals has held that any relationship of an occupation to production of goods for commerce, regardless of how negligible the contribution to production or how remote the relationship to commerce, is "closely related" and "directly essential" to commerce within the meaning of said section.

3. The Court of Appeals of the Fifth Circuit has rendered a decision in these cases which is in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *Mitchell v. Moore,* 241 F.2d 249, in the construction of Section 3(j) of the Fair Labor Standards Act.

It is to be noted at the outset that the answer to the first question presented for review depends upon an interpretation of the definition of "commerce" as that definition was amended in the sweeping amendments to the Fair Labor Standards Act adopted in 1949. It is conceded by the Respondent that the definition of "commerce," as contained in the Act before those amendments, would not cover the transportation of a fisherman's catch from international waters into a port of the United States, and consequently, *that the employees of Petitioners would not be covered unless the admendment to the definition of "commerce" extended coverage to them.* The legislative history of the amendment indicates a clear intent on the part of the Congress not to cover any importation of goods unless the shipment originated in a foreign port[2]. Yet the

[2]"Commerce. *The definition of 'commerce' in section 3(b) of the* act now covers outgoing foreign commerce 'from any State to any place outside thereof' in addition to interstate commerce *'among the several States.' It does not cover incoming foreign commerce. This House bill amended the definition* by substituting the word 'between' for the word 'from' and the word 'and' for the word 'to,' *so that the definition would cover foreign commerce 'between any State and any place outside thereof.'* The Senate amendment did not contain any provision amending this definition. The conference agreement adopts the House provision. *The effect of the amendment is to eliminate inequities under the act between employees engaged in foreign commerce based on whether the flow of such foreign commerce is out of a State rather than into it.* The amendment, will, for example, *place employees of importers on an equal footing with employees of exporters under the act."* (U. S. Code Congressional Service, Eighty-first Congress, First Session, Vol 2, (p. 2252) (Emphasis ours)

Court of Appeals held, *without citing a single decision interpreting the definition of "commerce" as amended,* that it is "settled finally by the courts" that such definition now includes the return of a fisherman to territorial waters with his catch. It is submitted that on the basis of the authorities outlined briefly below, the decision of the Court of Appeals violated the intent of the Congress, as expressed in Section 16(c) of the Act, precluding the institution of actions of the kind before the Court in doubtful cases.

It should be noted also that the answer to the second question presented for review depends upon an interpretation of the words "closely related . . . occupation directly essential to the production" of goods for commerce, as substituted for the words "necessary to the production" by the 1949 amendment. Again, the legislative history of this amendment indicates a clear congressional intent to exempt "the merchants (who) sell their goods locally", if "such goods do not become a part or ingredients of the goods produced by any of their customers". Yet the Court of Appeals, *without citing a single decision in which it was held that the occupation involved was "closely related" or "directly essential" within the meaning of the amendment,* held that the interpretation of the amendment was "settled finally by the courts" to include the manufacture and sale of ice locally, even though such ice did "not become a part or ingredients of goods produced" for commerce[3].

[3] The entire legislative history of this amendment is set out in Appendix to this Petition at page A-11.

It is clear that the Court of Appeals gave no significance whatsoever to the provisions of Section 16(c) of the Act providing that all issues of law, including interpretations of the Definitions section as amended contemporaneously with the adoption of Section 16(c), be "settled finally by the courts" as prerequisite to the institution of an action under that section. The legislative history of Section 16(c) makes it clear that the Secretary was not to bring any action for recovery of wages, as the new method of enforcement provided by that section, if such action involved an interpretation of the amendment to the definitions of the words "commerce" or "produced," or other 1949 amendments[4]. And it is equally clear that in treating the questions of law as though the court were permitted to do so as a matter of first impression, the Court did violence to the intent of the Congress in enacting the amendments to those definitions.

Before we proceed briefly to support the foregoing propositions by the citation of authorities, it should be pointed out, as this Court has so effectively done in its opinions, that the Act provides coverage for employees in two general categories, those who are (1) "engaged in commerce," or (2) "in the production of goods for commerce", and that the decisions dealing with employees in one category do not constitute precedent in

[4] The conference agreement adds a proviso to prevent the Administrator from using the authority granted in this section to bring test cases involving new or novel questions of law. The Administrator may use his authority under this section to bring a suit for an employee only in cases where the law has been settled finally by the courts. The proviso is not intended, however, to preclude the Administrator from instituting suits or the court from taking jurisdiction on the basis of existing legal precedents under the Fair Labor Standards Act of 1938 as amended, *except to the extent that they are changed by the amendments made by the conference agreement.* (Emphasis ours)

cases involving another category[5]. And it is also clear that there are various divisions of employees in each category which require separate treatment under the terms of the Act, and cases involving employees in one division cannot be applied in controversies involving employees in another division.

For example, employees who are "engaged in commerce" may be those who actually move in interstate commerce, or those who are engaged in working upon the *instrumentalities of commerce* by maintaining roads and bridges[6], by repairing interstate railroads[7], by outfitting and repairing boats employed in interstate commerce[8], by replacing locks on interstate waterways[9], and the like[10].

It should be noticed that the Respondent is not claiming that any of Petitioners' employes are "engaged in commerce" as members of either division of that category, and consequently decisions interpreting that clause of the Act have no application here.

[5] *Mitchell v. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739, 4 Law Ed 2d 753; *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 79 S. Ct. 260, 3 Law Ed. 2d 243. See also *Mitchell v. Jaffe*, 261 F.2d 883 (CCA 5); *Mitchell v. Hooper Equipment Co.*, 279 F.2d 893.

[6] *Overstreet v. North Shore Corp.*, 318 U.S. 125; 63 S.Ct. 494, Law Ed. 656.

[7] *J. F. Fitzgerald Construction Co. v. Pederson*, 318 U.S. 740, 63 S. Ct. 558, 87 Law Ed. 1119.

[8] *Walling v. Louce*, 5 W. H. Cases 937.

[9] *Mitchell v Vollmer & Co.*, 349 U.S. 427, 75 S.Ct 860, 99 Law Ed. 1196.

[10] *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 79 S.Ct. 260, 3 Law Ed.2d 243.

Employees who are engaged "in the production of goods for commerce" may be those who actually "produce, manufacture, mine, handle, transport, or in any other manner work on" goods moving in commerce"; or employees who "produce, manufacture, mine, handle, transport, or in any other manner work on" goods used in the construction or repair of *instrumentalities of commerce*[12]. It should be noted that the Respondent is not claiming that any of Petitioners' employees are in either of the foregoing divisions of those engaged "in the production of goods for commerce", and consequently decisions involving such employees have no application to the matters before the court.

However, employees engaged "in the production of goods for commerce" may also be those who "produce, manufacture, mine, handle, transport, or in any other manner work on" *goods consumed in the course of transportation in commerce*[13]. It is claimed by the Respondent that employees of Independent Ice & Cold Storage Company, Inc., who service the shrimp boats are covered as members of this division. And it is admitted by Petitioners that the cases cited in footnote 13 and on page 4 of the opinion of the Court of Appeals (pages A-4-5 of the Appendix to this petition).

[11] *Mitchell v. Jaffe*, 261 F.2d 883 (CCA 5); *Mitchell v. Moberly Fuel Co.* (E. Dist. Mo.—not officially reported); 30 Labor Cases, Paragraph 69, 933.

[12] *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S.Ct. 565, 97 Law Ed. 745; *Mitchell v. Hooper Equipment Co.*, 279 F.2d 893 (CCA 5).

[13] *Atlantic Company v. Walling*, 131 F.2d 518 (CCA 5); *Hamlet Ice Co. v. Fleming*, 127 F.2d 165 (CCA 4); *Chapman v. Home Ice Co. of Memphis*, 136 F.2d 353 (CCA 6); *Southern United Ice Co. v. Hendrix*, 153 F.2d 689 (CCA 6); *Mitchell v. Royal Baking Co.*, 219 F.2d 532 (CCA 5); *Mitchell v. Sherry Corine Corp.*, 264 F.2d 831 (CCA 4).

would establish coverage in this division *if the excursion of a fishing boat into international waters and return to home port was covered by the definition of "commerce", as contained in Section 3(b) of the Act.* None of the cases cited in the footnote or in the opinion of the Court of Appeals deals with the real question involved, however, *it being admitted in all of those cases that the goods were moving in interstate commerce, so that the definition of "commerce" was not involved and never discussed in any of them.* It is the interpretation of that definition in its relationship to the excursion of a fishing boat into extraterritorial waters and return that has never been decided, or even considered, *by any court since the amendment of the definition in 1949, or before.* The Court of Appeals took no note of this fact in presumably finding that the question was "settled finally by the courts."

Lastly, in the category of employees engaged in the production of goods for commerce are those who are engaged in a "closely related process or occupation directly essential to the production" of goods moving in commerce. The *only* cases cited by the Court of Appeals involving employees of this division, and decided since the drastic amendment of 1949 first introduced the quoted words into the Act, are the cases of *Mitchell v. Zachry Co.*, 362 U.S. 310, 80 S. Ct. 739, 4 L. Ed. 2d 753, and *Mitchell v. Jaffe,* 5th Cir. 1958, 261 F.2d 883. *And in both of those cases the employees in this division were held to be beyond the coverage of the Act because not engaged in an occupation "closely related (or) directly essential" to the production of goods for commerce.* It is true that in *Mitchell v. Jaffe,* supra, employees actually handling the scrap were held to be covered because they did "handle (and) work on" goods moving in commerce, and consequently, were engaged in

the production of goods for commerce in another division of employees covered by the Act; but the watchman whom the Secretary claimed was engaged in a closely related and directly essential occupation was held to be beyond the coverage of the Act because his work was neither "closely related" nor "directly essential" to the production of the scrap, even though he was charged with guarding "the whole establisnment" of his employer. And yet these two decisions are the only ones to which the Court of Appeals points as a basis for presumably finding that it was "settled finally by the courts" that employees of Petitioners who delivered relatively infinitesimal quantities of ice to Ocean Products Company were covered by the "closely related" and "directly essential" clause of the 1949 amendment. Actually, Petitioners are relying upon these two decisions to fully support their contention that the employees of a local merchant who makes sales to a wide variety of local consumers are not in an occupation "closely related" and "directly essential" to interstate commerce solely because an inconsequental amount of his product is used at some point in the processing of food, but does not become a part or ingredient thereof, part of which finds its way ultimately into interstate commerce. Certainly, it cannot be asserted that those decisions finally settle the law to the contrary.

No Court Has Held that 1949 Amendment to Definition of "Commerce" was Intended to Include Fishing Trip.

It must be remembered that under this branch of the cases Respondent is not claiming that the production of ice for the cooling of shrimp on the fishing grounds and the voyage back to port is "closely related (or) di-

rectly essential" to the production of goods for commerce. He did not prove that any part of the fish iced down by the Petitioners' product en route to port ever found its way into interstate commerce. His sole contention is that the transportation to home port was itself "commerce" within the 1949 amendment to the definition of that word.

It will be remembered that prior to 1949 *no incoming shipments, from foreign ports or otherwise, were covered by the Act.* The definition purported to cover only "trade, commerce, transportation, transmission, or communication *from any state to any place outside thereof".* The legislative history of the amendment specifically states that the definition was amended to "cover foreign commerce" and to "place employees of importers on an equal footing with employees of exporters under the Act"[14]. It was obviously never the intention of the Congress to extend coverage to any except those engaged in the business of "foreign commerce" or "importers" within the common acceptance of those terms. It is submitted that *fishermen are neither, and that any assumption to the contrary does flagrant violence to the common meaning of the terms used in the conference agreement and the plain intent of the Congress.* Yet the Court of Appeals held that such a contrary construction has been "settled finally by the courts."

To support this conclusion, three decisions are cited in the opinion. All of them were reached prior to 1949. One of them[15] involved the antitrust laws and did not arise under or in any way relate to the Fair

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[14]See Footnote 2, page 9.

[15]*Local 56 of International Fishermen v. United States*, 177 F.2d 320 (CCA 3) Cert. Den. 339 U.S. 947, 70 S. Ct. 801, 94 Law Ed. 1361

Labor Standards Act. Another[16] involved only the validity of provisions of the California Fish and Game Code and had no relevancy to or connection with the Fair Labor Standards Act. It could not possibly be contended that these decisions "settled finally" the interpretation of the Fair Labor Standards Act after the year 1949, particularly in view of the long line of decisions to the effect that the Congress never intended to utilize the full scope of its regulatory powers under the commerce clause of the Constitution in drafting the Fair Labor Standards Act *initially*[17], *and intended to restrict* its scope still more by the 1949 amendments[18].

The other case cited by the Court of Appeals was *Walling v. Lowe,* 5 W. H. Cases 937 (not officially reported). It will be remembered that the case actually involved employees "engaged in commerce", rather than those "engaged in the production of goods for commerce", in that they were repairing and outfitting *instrumentalities of commerce* in the form of boats used in interstate commerce. And it should also be pointed out that the case could have no other possible basis, because it was decided prior to 1949, *at which time the law expressly included only commerce "from any state to any place outside thereof".* Even Respondent does not claim that under the Act as it existed at the time of the decision in *Walling v. Lowe,* supra, the transportation of shrimp from the fishing grounds back to home port could be regarded as "commerce".

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[16]*Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 Law Ed. 772.

[17]*Walling v. Jacksonville Paper Co.*, 217 U.S. 570, 63 S. Ct. 332, 87 Law Ed. 467; *B. Kirschbaum Co. v. Walling*, 323 U.S. 525, 62 S. Ct. 1116, 86 Law Ed. 1648; *10 East 40th St. Building Co. v. Callus*, 325 U.S. 578, 65 S. Ct. 1127, 89 Law Ed. 1806

[18]*Mitchell v. Zachry Co.* 362 U.S. 310, 80 S. Ct.739, 4 Law Ed. 2d 753

The Court of Appeals cited no other authority and pointed to no other basis for holding that the 1949 amendment was intended to include fishing trips. In doing so, the Court not only disregarded the plain intent of the Congress, but nullified completely and almost without comment the proviso of Section 16(c) of the Act requiring that a contrary interpretation be "settled finally by the courts" at the time of the trial in the District Court in order to vest that court with jurisdiction.

In view of the foregoing, it is hardly necessary to call to the Court's attention a long line of federal decisions in which it has been held that the definition of "commerce" under the Fair Labor Standards Act means trade between two or more parties, and that it was never intended to cover transactions with "oneself". Reference to only a few such decisions should suffice. In *Fleming v. Jacksonville Paper Co.*, 128 F.2d 395 (CCA 5), the Court said:

> "Section 3, 29 U.S.C.A., § 203, which is the dictionary of the Act, declares that 'Commerce means trade, commerce, transportation, transmission, or communication' interstate. Transportation is only a part of it. Trade is another part, and according to the old maxim, it takes two to make a trade. Importer as well as exporter, buyer as well as seller, is a participant; and ordering and paying for goods are included."

128 F.2d 393.

The leading and most frequently quoted authority on this subject is the decision of the Fifth Circuit Court of Appeals in *Billeaudeau v. Temple Associates,* 213 F.2d 707 (CCA 5), where it is said:

"Plaintiffs here seek to bring themselves under Section 3(j), 29 U.S.C.A. § 203(j) relating to production of goods of commerce, as well as Section 3(b), 29 U.S.C.A. § 203(b), relating to engagement in commerce itself. The theory under which the plaintiffs seek coverage under Section 3(j) is that they engaged in the production of goods for commerce by guarding appellee's office on the construction premises, in which office were prepared and maintained payroll records, time sheets, and other matters pertaining to the labor force, which were regularly shipped between appellee's home office in Dibold, Texas, and the office on the construction site in Ville Platte, Louisiana. But the exchange of documents between the home office in Texas and the construction office in Louisiana is not commerce as defined by the Act. Commerce has no application to the internal affairs of appellee. Commerce, as defined in the Act, does not include commerce with oneself. Mitchell v. Joyce Agency, 7 Cir., 211 F.2d 241."

213 F.2d 711

The case of *Mitchell v. Joyce Agency,* 211 F.2d 241 (CCA 7) referred to in *Billeaudeau,* dealt with a contention of the Secretary of Labor to the effect that telephone communication across state lines between agents of the same employer constituted "commerce". The Court said:

"Section 3 of the act, 29 U.S.C.A. § 203, declares that 'Commerce' means trade, commerce, transportation, transmission, or communication, interstate. As was said in Fleming v. Jacksonville Paper Co., 5 Cir. 128 F.2d 395, at page 398:

" 'Transportation is only a part of it. Trade is another part, and according to the old maxim, it takes two to make a trade. Importer as well

> as exporter, buyer as well as seller, is a participant; and ordering and paying for good are included.'
>
> "If it takes two to make a trade, these two must be the employer and another person or firm with which he is dealing."
> 211 F.2d 248

This Court has had occasion to define commerce in the broad sense in which it is used in the Constitution of the United States. In *Hopkins v. United States,* 171 U.S. 578, 19 S. Ct. 47, 43 L Ed 290, this Court said:

> " 'Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purpose of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all of the instruments by which such commerce may be conducted'."
> 171 U.S. 597

It may be seen, therefore, that the word "commerce" is used in the Constitution and more particularly in the Fair Labor Standards Act in its ordinary sense and acceptance, as meaning trade, barter, or exchange *between two parties.* There is no decision in which it has been held that it means simply the transportation of goods, such as a fisherman's catch, from international waters back to his home berth in Florida, without trade, barter, exchange or even communication with any other party.

No Court Has Held that the Sale of a Product by a Merchant Who Sells Such Product Locally is "Closely Related" or "Directly Essential" to Commerce, Even Though the Product is Used Remotely in Processing Goods for Commerce, if it does not Become a Part or Ingredient of such Goods.

It will be remembered from the legislative history of the amendment to Section 3(j) that it was intended to reduce coverage under the Act and expressly to exclude employees of "merchants (who) sell their goods locally" when "such goods do not become a part or ingredients of the goods produced" for commerce. The report of the House conferees (which is the legislative history of the Act) cites a number of examples of cases wherein the Act had previously been held to apply and which were expressly intended to be excluded by the 1949 amendment. The report then concludes as follows:

> "All such employees, as well as the employees of the merchant selling his goods locally . . . are quite clearly not performing any activities that are closely related or directly essential to the production of goods".

Actually, long before the amendment, this Court had frequently expressed concern with a tendency "to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation"[1].

The intent of the Congress, as expressed in the legislative history of the amendment, has been given effect in every decision since the same went into effect. As stated above, *the Court of Appeals cited no case in*

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[1] *10 E. 40th Street Building Co. v. Callus*, supra.

which it was held that an employee was engaged in an occupation "closely related" and "directly essential" to the production of goods for commerce, as authority for holding that the Act applied in these cases by an interpretation "settled finally by the courts". In fact, *there has been no decision in this Court or in the courts of appeals in which it has been held, even in suits for injunction, that an employee was engaged in any occupation "closely related" and "directly essential" to the production of good for commerce.* All of the decisions since the 1949 amendment have been to the contrary[20].

Without exception the decisions cited by the Court of Appeals to support its conclusion of coverage (Footnotes on page 8 of the opinion of the Court of Appeals, page A-8 of the Appendix to this petition), were decided prior to the 1949 amendments. It is literally impossible to determine how the interpretation of the sweeping amendments of 1949 and the new language so carefully chosen and utilized therein, could have been settled by decisions reached prior to the enactment of the amendment.

In *Mitchell v. Zachry Co.,* supra, this Court held that the amendment, read in the light of its legislative history "requires that we once again apply the formulation set down in *Kirschbaum,* which, in light of the 1949 amendment, we must do with renewed awareness of the purpose of Congress to avoid intrusion into withdrawn local activities." In speaking of the difference between

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[20] *Mitchell v. Zachry Co.*, supra; *Mitchell v. Moore*, 241 F.2d 249 (CCA 6); *Mitchell v. Jaffe*, 261 F.2d 883 (CCA 5); *Sams v. Beckworth*, 261 F.2d 889 (CCA 5); *Mitchell v. W. E. Belcher Lumber Co.*, 279 F.2d 789 (CCA 5); *Mitchell v. Wade Lahar Construction Co.*, 179 F. Supp. 551 (W. Dist. Ark. 1960).

original construction and repair, this Court again cautioned that "Our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate". And finally, the Court said:

> ". . . Bearing in mind the cautionary revision in 1949, and that the focal center of coverage is 'commerce,' the combination of the remoteness of this construction from production, and the absence of a dedication of the completed facilities either exclusively or primarily to production, persuades us that the activity is not 'closely related' or 'directly essential' to production for 'commerce'."
>
> 362 U.S. 321

It will be recalled that this Court was there concerned with the application of the Act to employees engaged in building a dam to impound waters to be used in supplying various customers, including many engaged in the production of goods for commerce. The Court held that this activity was not covered by the Act.

Even more convincing, although less authoritative, are some of the other decisions decided since the 1949 amendments. In *Mitchell v. Moore,* supra, the Sixth Circuit Court of Appeals held that employees who manufactured, processed and sold feed for livestock and poultry in a rural area of Kentucky were not engaged in an occupation closely related or directly essential to the production of goods for commerce, even though the poultry raised on such feed was regularly shipped interstate. It should be noted that in the cited case, not only was the feed indispensable to the process of raising the poultry, but it became a part and ingredient of the "goods" for commerce by virtue of the nutriment which it provided for growth and the building of tissue which became the finished product.

It was held in the case of *Mitchell v. W. E. Belcher Lumber Co.*, supra, by the Fifth Circuit Court of Appeals, that employees planting pine seedlings and eliminating competing growth were not engaged in an occupation closely related or directly essential to production of pine lumber for interstate commerce. There can be no question that the actual handling of the seedlings and the cutting out of competing growth were steps in the processing of the lumber, and indispensable to the production of the finished product. In that case, the Court specifically called attention to the legislative history of the 1949 amendment, and particularly, to the expressed intention of the Congress to remove cases similar to *McComb v. Super-A Fertilizer Works*, 165 F.2d 824 (CCA 1) from the application of the Act. There, the product manufactured by the employees was fertilizer which nourished and became a part and ingredient of the sugar cane producing sugar for commerce. But the report of the conferees left no doubt about the intent of the Congress to exclude such local activities as the manufacture and sale of fertilizer, even though such product was indispensable in the processing of "goods" for commerce and actually became a part and ingredient thereof.

It is clear, of course, that the ice sold to Ocean Products Company and used at one point in processing its shrimp did not become in any form a part or ingredient of "goods" produced for commerce. Its usefulness was fleeting and incidental, its benefits purely temporary and insubstantial. *Moore, Belcher Lumber Co.*, and *Super-A Fertilizer Works*, all make a better case for application of the Act than do the cases at bar.

It will be recalled that in *Mitchell v. Jaffe*, supra, the only employee in the division under discussion was held to be excluded by the 1949 amendment. The same is true of *Sams v. Beckworth*, supra, also decided by the Fifth Circuit Court of Appeals. And in *Mitchell v Wade Lahar Construction Co.*, supra, it was held that the construction of a reservoir actually bounded by two different states, and constituting a waterway for interstate commerce, was "strictly local activity" not within the purview of the Act.

None of the foregoing decisions was cited by the Court of Appeals, and we call them to this Court's attention to show that *literally all of the decisions interpreting the 1949 amendment of Section 3(j) have held that the employees involved were not covered by its provisions.* By what process of reasoning can it be said that these decisions somehow settled finally the interpretation of the amendment to the contrary?

The proviso of Section 16(c) of the Act has been before this Court only once, in the case of ***Mitchell v. Lublin, McGaughy & Associates***, 358 U.S. 207, 79 S. Ct. 260, 3 L. ed 2d 243. Although the action sought an injunction and was not brought under Section 16(c), and the employees involved were "engaged in commerce" and not in production of goods, the proviso was examined with the following comments:

> "The act sets up four means for enforcement. Section 16(a), 29 U.S.C. § 216(a), provides for criminal prosecution of willful violators. Section 16(b), 29 U.S.C. § 216(b), gives individual employees rights of actions in civil suits to recover unpaid minimum wages, overtime compensation and certain liquidated damages. Section 16(c), 29 U.S.C. § 216 (c), allows the Secretary of Labor to bring

such an action in behalf of such employees provided the suit does not involve 'an issue of law which has not been settled finally by the courts.' Section 17, 29 U.S.C. § 217, of course, provides for injunctions. Even a cursory examination of these provisions shows that the injunction is the only effective device available to the Secretary when coverage is in doubt and he wishes to establish the availability of the Act to employees not theretofore afforded its protections."

358 U.S. 214

It is submitted that there exists more than a mere "doubt" about the application of the Act to employees of a local manufacturer of ice who happens to include among his customers one who uses a small portion of his product in the early stages of processing shrimp for interstate commerce. Such activity "spontaneously satisfies the common understanding of what is local business"[21]. And, as established by the decisions, such employees, and those engaged in making sales of ice to fishing boats, have "not theretofore" been afforded the protection of the Act. The respondent has sought to "make law" and extend coverage by an enforcement method never intended by the Congress to serve that purpose.

The only other cases cited by the Court of Appeals, on pages 8 and 9 of this opinion (pages A-8-9 of the Appendix to this petition), reject application of the so-called *de minimus* rule. But in every one of the cases cited, the employees were *engaged in production of goods*

[21] *10 East 40th St. Bldg. v. Callus*, supra.

moving in commerce, and not a single one of the cases considers the *de minimus* rule in connection with the question of whether or not an occupation is closely related or directly essential to the production of goods for commerce. It cannot be sensibly contended, particularly in view of *Mitchell v. Zachry Co.*, supra, that the percentage of the employee's work which is actually related to the production of goods for commerce has no bearing upon whether or not his occupation is closely related or directly essential to such production, or has no bearing upon a determination as to whether or not he is engaged in a local activity within the meaning of the decisions. Again, no court has ever so held.

At the trial of the instant cases, the Petitioners did not have an opportunity to present their proof, because the District Judge found that he was without jurisdiction on the basis of Respondent's case. However, it does appear from Respondent's evidence that only four or five tons of ice per day were sold to Ocean Products Company by the corporate Petitioner, or a maximum of less than 150 tons a month. No proof was introduced of the volume of sales from the platform, on commercial routes and through substations, but it does appear that approximately 7000 tons of ice per month were sold for use on shrimp boats. Consequently, only a little more than 2% of the tonnage sold to shrimp boat owners alone was sold to Ocean Products Company for use in processing shrimp. It must be assumed that the percentage of total sales was much smaller. Therefore, the relative quantity of ice sold for use in processing shrimp was infinitesimal. There is a marked similarity between this analysis of the facts and the comments of this Court in *Mitchell v. Zachry Co., supra.* In concluding the opinion in that case the Court said:

"Moreover, though construction and operation of this dam are equally 'directly essential' to the producers who require the water impounded and distributed, neither the construction nor the operation of the dam is designed for their use. Water is supplied by the District to a miscellany of users throughout its geographical area, and somewhat less than half of the consumption is by producers. These facilities, and their construction, are thus to be differentiated from the irrigation system in the Farmers Reservoir Case[22], which was dedicated exclusively to supply water to farmers producing for commerce.

* * *

"The Secretary alternatively urges that because some of the water supplied by the District *is consumed by facilities and instrumentalities of commerce,* the water should be regarded as 'goods' produced 'for commerce' and the construction of the dam should be found sufficiently related to such production to be within the Act's coverage. He relies on Alstate Constr. Co. v. Durkin, supra, and compares the water here to construction materials there produced primarily for use in road construction. It is a sufficient answer to this contention that the record is devoid of evidence of a purposeful and substantial dedication of otherwise local production to consumption by 'commerce' which was the basis of our decisions in Alstate. Indeed, it appears that the water supplied to the facilities and instrumentalities of commerce is but an insignificant portion of the total." (Emphasis ours).

362 U.S. 320-321

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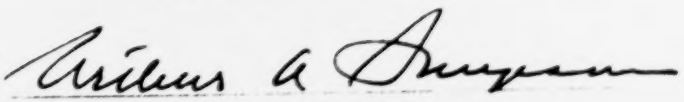
[22]This is a reference to the case of *McComb v. Farmers Reservoir & Irrigation Co.*, 167 F.2d 911 (CCA 10), decided prior to the 1949 amendment and here distinguished by this Court to preclude any attempted application to facts similar to those in the cases at bar.

It is submitted that any ice sold by the Petitioners for the processing of shrimp for interstate commerce was "but an insignificant portion of the total" sold for other purposes, all of them essentially local in character.

But despite the conclusiveness of the case made for denying coverage, that is not the question before this Court. The question can only be stated in positive form by saying that no court has ever reached a decision which could be construed as finally settling the application of the Act to Petitioners' employees because their occupation was closely related and directly essential to the production of goods for commerce by Ocean Products Company. The Court of Appeals could point to no such decision, and it is confidently asserted that never since the terms "closely related" and "directly essential" were introduced into the Act has any such interpretation been judicially announced.

And Petitioners respectfully pray that this Court will issue writ of certiorari to the United States Court of Appeals for the Fifth Circuit and reverse the judgment there entered.

Respectfully submitted,



Attorney for Petitioners

Of Counsel
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CERTIFICATE

I, ARTHUR A. SIMPSON, one of the attorneys for Independent Ice & Cold Storage Company, Inc., and Dan Arias, Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 31st day of October, 1961, I served copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States on the Respondent named therein by mailing copies in duly addressed envelopes, with first-class postage prepaid, to his respective attorneys of record as follows:

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IN THE

UNITED STATES
COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18569

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor (ARTHUR J. GOLDBERG, Secretary of Labor, substituted as party appellant in the place and stead of James P. Mitchell, resigned),

Appellant,

versus

INDEPENDENT ICE & COLD STORAGE COMPANY, INC., and DAN ARIAS,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(August 16, 1961)

Before TUTTLE, Chief Judge, and JONES and WISDOM, Circuit Judges.

JONES, Circuit Judge: The Secretary of Labor, as authorized by Section 16(c) of the Fair Labor Stand-

ards Act, as amended,[1] brought two actions, which were consolidated by the district court, seeking to recover unpaid minimum wages under Section 6 of the Act,[2] and for overtime compensation under Section 7 of the Act,[3] for thirteen employees and former employees of the corporate appellee, Independent Ice & Cold Storage Company, Inc., of which the individual appellee, Dan Arias, is president, general manager and principal stockholder. The appellees made the contention, among others, that the employees were not covered by the Act. At the close of the Secretary's case, the appellees made a motion to dismiss on the ground that the question of coverage presented an issue of law which has not been finally settled by the

[1]"When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: Provided, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled." 29 U.S.C.A. § 216 (c).

[2]"Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) not less than $1 an hour;

* * * * *

29 U.S.C.A. § 206 (a) (1).

[3]"Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce, for a work-week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * "

29 U.S.C.A. § 207 (a).

courts. The motion was granted and the actions were dismissed. The district court's findings and conclusions are reported in 183 F. Supp. 686. The Secretary has appealed from the judgment of dismissal.

The corporate appellee, Independent Ice & Cold Storage Company, Inc., here referred to as Independent, operates a plant in Tampa, Florida, for the manufacture of ice which it sells from its plant platform, from commercial routes, and from substations, all in or in the area of Tampa. Independent also makes sales of ice to those in two phases of the shrimp industry. It sells approximately 7000 tons of ice per month to shrimp boats which fish from the Port of Tampa. This ice is hauled to the docks where it is crushed and blown into the holds of the shrimp boats. Each boat uses, on each trip, between 25 and 32 tons. The boats, with the ice on board, sail to the area of Campeche Bay about 750 miles away. The shrimp there caught are placed in the hold and iced. On the return of the boats, the ice has been consumed, the shrimp are unloaded, sold to distributors, and started on their way toward marketing. The round trip is usually of a duration of 40 to 50 days. Independent also sells, at irregular but frequent intervals, ice to shrimp packing houses which supplements ice procured by them from another source. It is used on the peeling tables to keep the shrimp cold while being peeled and graded. This ice is consumed in use. The shrimp, without ice, are removed from the peeling tables, packed in containers and then frozen. A large percentage of the shrimp so packed and frozen subsequently move in interstate commerce.

The district court determined that the question as to whether the employees of Independent, for whom the Secretary sued, were engaged in the "production of goods for commerce" within the meaning of the Act,[4] involved an issue of law which has not been settled finally by the courts. The correctness of the judgment, entered upon the district court's determination, is presented by the appeal.

It has been held that where employees of an ice manufacturer are engaged in making, selling and delivering ice to railroads and truckers for the refrigeration of goods while being shipped from one state to another, such employees are engaged in the production of goods for commerce even though it was entirely consumed in the course of its use. *Atlantic Co. v. Walling,* 5th Cir. 1942, 131 F. 2d 518. See also *Southern United Ice Co. v. Hendrix,* 6th Cir. 1946, 153 F. 2d 689; *Chapman v. Home Ice Co. of Memphis,* 6th Cir. 1943, 136 F.

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[4]"As used in the Act—

* * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State." 29 U.S.C.A. §203 (b), (i), (j).

2d 353, cert. den. 320 U.S. 761, 64 S. Ct. 72, 88 L. Ed. 454; *Hamlet Ice Co. v. Fleming*, 4th Cir. 1942, 127 F. 2d 165, cert. den. 317 U.S. 634, 63 S. Ct. 29, 87 L. Ed. 511; *Hansen v. Salinas Valley Ice Co.*, 62 Calif. App. 896, 144 P. 2d 896.

Independent asserts that there has been no trade, traffic or intercourse, that absent trading there is no commerce, and that the taking of a shrimp boat from port to a shrimp bed and returning to port with a catch is not within the meaning of commerce as defined by the Act. The district court agreed with this view, apparently, or determined that the law on the point was not settled. The Secretary insists that trading, traffic and intercourse are in no sense essential to commerce. There is, to be sure, no trading or trafficking of ice by the operator of the shrimper. Neither is there of the ice in the refrigerator car. Cf. *Atlantic Co. v. Walling, supra*. But there is a production of goods and those goods are transported upon a commercial venture and that transportation is commerce.

The shrimping expeditions carried the vessels far beyond the territorial limits of Florida. The acts and transactions, not being wholly within the State, are not subject to regulation as intrastate commerce by the State. It will not be supposed that such excursions are free from regulation. The power of the United States to require the registry or enrollment of vessels in the fishing trade[5] will not now be questioned. The operation of the Death on the High Seas Act[6] is not limited to death resulting from injuries sustained on a vessel

[5] 46 U.S.C.A. §§221, 251.

[6] 46 U.S.C.A. §761 et seq.

bound to or from a foreign port. Other examples of federal regulations of navigation, shipping and fishing might be cited. There has never been a slavish literalness in the determination of the power "To regulate Commerce with foreign Nations and among the several States." If there is commerce which involves the crossing of a State boundary it is subject to federal regulation. The Ninth Circuit has held, in a criminal case brought under the Sherman Anti-Trust Act,[7] that fishing in the territorial waters of Southern California and Mexico and in the high seas fall into the rubric of interstate and foreign commerce, and the transportation of the catch to the fishing ports of Southern California was commerce. *Local 36 of International Fishermen v. United States,* 9th Cir. 1949, 177 F. 2d 320, cert. den. 339 U.S. 947, 70 S. Ct. 801, 94 L. Ed. 1361. The District Court for the Southern District of Florida, the court of the origin of this case, decided, in a Wage and Hour case, that a shipyard and its employees were in commerce where a substantial part of its business was the making of repairs to boats used for fishing outside the Florida territorial waters and for taking tourist parties into the Gulf of Mexico and back to port. *Walling v. Lowe,* 5 W. H. Cases 937. See *Bayside Fish Flour Co. v. Gentry,* 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772. In recognition of the principle that there may be commerce without entering another state or a foreign nation after crossing a state boundary, Congress defined commerce as including acts and transactions not only "among the several States" but also "between any State and any place outside thereof." Here the shrimp vessels went from the Port of Tampa to the shrimp beds in the Bay

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[7] 15 U.S.C.A. § 1 et seq.

of Campeche in the Gulf of Mexico, a place outside the State of Florida and returned from that place to the Port of Tampa. The employees of the Company who were engaged in the production of ice for the shrimp boats were engaged in commerce and subject to the coverage of the Act. The proviso which denies jurisdiction of an action involving an issue of law not settled finally by the courts was for the purpose of preventing the Secretary from bringing test cases involving new or novel questions of law. Conf. Rep. No. 1453, U.S. Code Congressional Service, 81st Cong., 1st Sess. 1949, p. 2272. The facts here do not bring the case within the exclusionary proviso.

As to the ice used in refrigerating shrimp in the packing houses there are two questions, whether the ice used was "directly essential" to the production of goods for commerce, and if so, whether the quantity of ice so used is so negligible as to bring a rule of de minimis into operation. If these issues be resolved against Independent, the question will recur as to whether they have been settled finally by the courts. To sustain the district court's decision, Independent points to the 1949 amendment to Section 3(j) of the Act, 29 U.S.C.A. § 203 (j), which changed the definition of "produced" so that instead of including "any process or occupation necessary to the production" of goods for commerce, the clause included "any *closely related* process or occupation *directly essential* to the production thereof." (Emphasis supplied). The amendment which, concededly, placed a further limitation upon the concept of production of goods and further restricted the coverage of the Act, excluded from coverage activities which Congress deemed too remote from commerce or too in-

cidental to it. *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 80 S. Ct. 739, 4 L. Ed. 2d 753; *Mitchell v. Jaffe*, 5th Cir. 1958, 261 F. 2d 883.

Prior to the 1949 Amendment producers of electric power,[8] fuel,[9] and water,[10] used by the purchaser in the production of goods for commerce, and their employees, were subject to the Act as being in occupations necessary to the production of goods for commerce. The Conference Report, supra, recited that it was intended that "employees of public utilities furnishing gas, electricity, or water to firms within the State engaged in manufacturing, producing or mining goods for commerce will remain subject to the Act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce." U. S. Code Congressional Service, 81st Cong. 1st Sess., 1949, p. 2253. See *Mitchell v. H. B. Zachry Co., supra.* It is clearly apparent that the shrimp packers are engaged in the production of goods for commerce and that the manufacture and delivery of ice for the preservation by means of refrigeration of the shrimp while in process of production for commerce is closely related and directly essential thereto.

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[8] Lewis v. Florida Power & Light Co., 5th Cir. 1946, 154 F. 2d 751, Phillips v. Meeker Cooperative Light and Power Association, 8th Cir., 1946, 158 F. 2d 698.

[9] West Kentucky Coal Co. v. Walling, 6th Cir. 153 F. 2d 582

[10] Farmers Reservoir & Irrigation Co. v. McComb, 337 U. S. 755, 69 S. Ct. 1274, 93 L. Ed. 1672, reh. den. 338 U. S. 839, 70 S. Ct. 31, 94 L. Ed. 513. Reynolds v. Salt River Valley Water Users Association, 9th Cir., 1944, 143 F. 2d 863, cert. den. 323 U. S. 764, 65 S. Ct. 117, 89 L. Ed. 611.

Independent furnished ice to the shrimp packers at regular and frequent intervals and in substantial amounts. It is immaterial that the ice so furnished was but a very small percentage of Independent's overall business. *Mabee v. White Plains Publishing Co.*, 327 *U.S.* 178, 66 S. Ct. 511, 90 L. Ed. 607, *Mitchell v. Hooper Equipment Co.*, 5th Cir. 1960, 279 F. 2d 893; *Mitchell v. Jaffe, supra; Tilbury v. Rogers*, D. C. W. D. La. 1954, 123 F. Supp. 109, aff. 5th Cir. 1955, 220 F. 2d 757, cert. den. 350 U.S. 839, 76 S. Ct. 77, 100 L. Ed. 748; *Mitchell v. Royal Baking Co.*, 5th Cir. 1955, 219 F. 2d 532. The de minimis doctrine which is applicable, if at all, only where deliveries of goods are sporadic and of insubstantial amounts. has no application here.

The reasons which we have for finding that there is no issue of law which has not been settled finally by the courts with respect to ice furnished to the shrimp vessels are no less impelling as to the ice furnished to the shrimp packers.

It is our considered conclusion that the Secretary should have prevailed in his attempt to recover from the employees and former employees of Independent on whose behalf he sued if his proof sustains the claims he asserts. For further proceeding the judgment of the district court is

REVERSED AND REMANDED.

A true copy

Test: EDWARD W. WADSWORTH

(Seal) U. S. Court of Appeals,
Fifth Circuit

September 12, 1961.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs. Inc., N. O., La.

JUDGMENT

Extract from the Minutes of August 16, 1961

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor (ARTHUR J. GOLDBURG, Secretary of Labor, substituted as party appellant in the place and stead of JAMES P. MITCHELL, resigned)

No. 18569 versus

INDEPENDENT ICE & COLD STORAGE COMPANY, INC., and DAN ARIAS

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

The Legislative history of the amendment to Section 3(j) of the Fair Labor Standards Act in 1949 is set out in U. S. Code Congressional Service, 81st Congress, 1st Session, Volume II, at Pages 2252 to 2254 as follows:

Section 3 of the Act. relating to definitions is unchanged by the conference agreement except that definitions of the terms "commerce," "produced," and "oppressive child labor" are amended and new definitive language is provided for the terms "resale" and "hours worked."

Produced.—The House bill amended the definition of "produced" in section 3(j) by inserting the words "closely related" before the words "process or occupation". The Senate amendment left the definition of "produced" as contained in the present law unchanged. The bill as agreed to in conference follows the House bill except that the words "directly essential" are substituted for the word "indispensable."

Coverage under the act for a large category of employees is determined by the definition of the term "produced". The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee "producing, manufacturing, mining, handling, transporting, or in any other manner work on *** goods." Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance, clerical or custodial work. The second part of the present definition, covering any employee engaged in *"any process or occupation necessary to the production" of goods, has been interpreted by the Admin-*

istrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredients of the goods produced by any of their customers (emphasis ours) (McComb v. Deibert (E.D. Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N.D. Ohio 1948)).

Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases. (Emphasis ours). On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (Kirschbaum v. Walling, 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. Likewise, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce, will remain subject to the act. All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for commerce.

The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State (McComb, Administrator v. Super-A Fertilizer Works, 165 F. (2d) 824 (C.C.A. I).

2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) 385 (C.C.A. 10); cert. den., 328 U.S. 858).

3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (Martino v. Michigan Window Cleaning Company, 327 U.S. 173; reh'g den., 327 U.S. 816).

4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., pp. 138-139).

6. Employees of a local exterminator service firm who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 C.C.H., Labor Law Reporter 4th ed., No. 25,150,385).

All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, *are quite clearly not performing any activities that are closely related or directly essential to the production of goods.* (emphasis ours).

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 530

INDEPENDENT ICE & COLD STORAGE COMPANY, INC., AND DAN ARIAS, PETITIONERS

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 183 F.Supp. 686. The opinion of the Court of Appeals (Pet. A 1-9) is reported at 294 F.2d 186.

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1961. The petition for a writ of certiorari was filed November 1, 1961, but was not served upon the government until November 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it has been "settled finally by the courts" within the meaning of Section 16(c) of the Fair Labor Standards Act (1) that the movement of shrimp boats across state lines into international fishing waters and their return to port constitute "commerce" within the meaning of the Act, or (2) that the production of ice for use in the processing of shrimp for interstate commerce is "production of goods for commerce" within the meaning of the Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), are set forth at pages 4 and 5 of the Petition.

STATEMENT

These actions were brought by the Secretary of Labor under Section 16(c) of the Fair Labor Standards Act to recover unpaid minimum wages and overtime compensation. Corporate petitioner, which operates a plant in Tampa, Florida, for the manufacture of artificial ice, regularly sells ice, among other purposes, (a) for use in shrimp boats plying to and from international fishing waters to refrigerate the catch (R. 46, 49), and (b) for use in processing shrimp for interstate commerce by shrimp packing houses (R. 47, 49).

The ice sold to shrimp boats is blown into the hold of the vessels which fish from the Port of Tampa and

is transported out of the state for some 750 miles through international waters to fishing grounds in the Bay of Campeche off the coast of Mexico to refrigerate shrimp during the fishing operations and the vessels' return to Tampa (R. 46, 49). The ice sold to packing houses is consumed in preserving the shrimp during grading, peeling, and veining operations (R. 47).

The district court dismissed the actions on the ground that the question of coverage presented an issue of law not yet "settled finally by the courts" within the meaning of Section 16(c) of the Act (R. 50). The Court of Appeals reversed, holding (1) that the production of ice for the shrimp boats was production of goods for commerce (Pet. A-7), (2) that the production of ice for preservation of shrimp during processing is closely related and directly essential thereto, and is therefore production of goods for commerce (Pet. A-8), and (3) that, with respect to both questions, "there is no issue of law which has not been settled finally by the courts * * *" (Pet. A-9).

ARGUMENT

The petition asserts that a question of general importance is presented by the decision of the court below that the case involved no "issue of law which has not been settled finally by the courts" (Section 16(c)). Petitioner makes no such claim, however, with respect to the two underlying issues of coverage. No other reason for granting certiorari is urged in connection with the holding that manufacturing ice for shrimp boats fishing in international waters is

producing goods for commerce, but the holding that supplying ice for shrimp processors is production for commerce is said to be in conflict with *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, and *Mitchell* v. *Moore*, 241 F.2d 249 (C.A. 6).

The court below properly applied the "settled finally" requirement of Section 16(c) of the Act in accordance with the consistent interpretations of other courts of appeals and correctly decided the underlying questions of coverage. The facts of the instant case are not at all comparable to those in the cases asserted to be in conflict, and no question is presented warranting review by this Court.

1. The ruling of the court below "that there is no issue of law which has not been settled finally by the courts" (Pet. A-9) is based on judicial decisions which the subsequent discussion will show are clearly dispositive in principle of the questions of coverage here involved even though the facts were not identical. This interpretation of the "settled finally" proviso is in accord with numerous decisions that "incidental factual variations" such as obtain between any two cases, however fundamentally alike, do not render the issue of law unsettled and that a requirement of identical facts as a condition to an action under Section 16(c) would be an "extreme and unreasonable" construction which "would virtually nullify the salutary provision for the recovery of unpaid compensation without expense to the claimant." *Mitchell* v. *Emala & Associates*, 274 F.2d 781, 782, 783 (C.A. 4); *Mitchell* v. *C & P Shoe Corp.*, 286 F.2d 109, 113-114 (C.A. 5); *Mitchell* v. *Clyde Owen*

Sand & Gravel Co., 292 F.2d 71, 75 (C.A. 6); *Austford* v. *Goldberg*, 292 F.2d 234, 238 (C.A. 8).

2. Petitioners concede that there is coverage of the production of ice for the shrimp boats "if the excursion of a fishing boat into international waters and return to home port [is] covered by the definition of 'commerce,' as contained in Section 3(b) of the Act" (Pet. 14).[1] They contend, however, that such voyages are not "commerce" both because there is no foreign or interstate port of destination for the shrimp boats and because what is involved is simply the transportation of goods and not "trade, barter, or exchange" (Pet. 20). The former contention is clearly contrary to the explicit wording of the statute which defines commerce to include transportation "between any State and any place outside thereof." See *Walling* v. *Lowe*, 5 WH Cases 937 (S.D. Fla.) The latter position—that transportation without trade is not "commerce"—is foreclosed by *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, which expressly notes that commerce under Section 3(b) of the Act includes "interstate transportation", and that the Act applies to employees engaged in the production of goods "for interstate transportation for use or consumption, as distinguished from transportation of

[1] The cases are clear that the production of ice for use in interstate transportation is "production of goods for commerce". *Atlantic Co.* v. *Walling*, 131 F.2d 518 (C.A. 5); *Chapman* v. *Home Ice Co. of Memphis*, 136 F.2d 353 (C.A. 6), certiorari denied, 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix*, 153 F.2d 689 (C.A. 6); and *Hamlet Ice Co.* v. *Fleming*, 127 F.2d 165 (C.A. 4), certiorari denied, 317 U.S. 634. Cf. *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16, fn. 14.

them for sale or exchange." 339 U.S. at 512. The scope of "commerce" under the Act, to the extent relevant here, has thus been "settled finally" by this Court.

The alternative basis of coverage, that "the manufacture and delivery of ice for the preservation * * * of the shrimp while in process of production for commerce is closely related and directly essential thereto", and is therefore itself "production of goods for commerce" (Pet. A-8), is similarly "settled finally by the courts". The furnishing of power, water, and other services to a producer for commerce has consistently been held to be production for commerce within the special definition of Section 3(j).[2] *McComb* v. *Farmers Reservoir & Irrigation Co.*, 167 F.2d 911 (C.A. 10), affirmed with a modification not here relevant, 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Ass'n*, 143 F.2d 863 (C.A. 9), certiorari denied, 323 U.S. 764; *Lewis* v. *Florida Power & Light Co.*, 154 F.2d 751 (C.A. 5); *Walling* v. *Amidon*, 153 F.2d 159 (C.A. 10); *West Kentucky Coal Co.* v. *Walling*, 153 F.2d 582 (C.A. 6); *Meeker Cooperative Light & Power Ass'n* v. *Phillips*, 158 F.2d 698, 699 (C.A. 8), affirming 63 F.Supp. 733 (D. Minn.); *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3); *New Mexico Public Service Co.* v. *Engel*, 145 F.2d 636 (C.A. 10); *Davila* v. *Porto Rico Ry. Light & Power Co.*, 143 F.2d 236 (C.A.

[2] It is not material that the ice sold to shrimp processors was a small proportion of petitioner's overall business, as the petition argues (p. 29), since those sales were made "at regular and frequent intervals and in substantial amounts" (Pet. A-9). *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Mitchell* v. *Jaffe*, 261 F.2d 883 (C.A. 5).

1); *Walling* v. *Hamner*, 64 F.Supp. 690 (W.D. Va.); *Mitchell* v. *Moberly Fuel Co.*, 12 WH Cases 848, 30 Lab. Cases, para. 69,933 (E.D. Mo., 1956, not officially reported); *Holland* v. *Amoskeag Machine Co.*, 44 F.Supp. 884 (D. N.H.). The furnishing of ice to such a producer is but an "incidental factual variation" without legal significance.

Neither *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, nor *Mitchell* v. *Moore*, 241 F.2d 249 (C.A. 6), announces any rule of law inconsistent with that applied here. Both involve factual situations so different as to belie the suggestion of a conflict. In fact, both decisions recognize the continuing validity, after the 1949 amendment to Section 3(j), of the line of decisions relied upon by the court below. In *Zachry*, this Court referred to "supplying water to the producers of goods for commerce" as an illustration of coverage which, according to the legislative history, "remains unchanged by the amendment." 362 U.S. at 318. In *Moore*, the court cited these decisions as representing existing law but as inapplicable to the peculiar facts of that case. 241 F.2d at 250. Moreover, the legislative history makes clear that the 1949 amendment preserved the vitality of these decisions by including among its references to employees "whose work is closely related and directly essential to production" and who would remain within the amended coverage, those engaged in—

> 2. Producing and supplying fuel, power, water, or other goods for customers using such goods in the production of different goods for interstate

commerce. *Reynolds* v. *Salt River Valley Water Users Asso.* (143 F. (2d) 863 (C.A. 9)); *Phillips* v. *Meeker Coop. Light and Power Asso.* (158 F. (2d) 698 (C.A. 8)); *Lewis* v. *Florida Light and Power Co.* (154 F. (2d) 751 (C.A. 5)); *West Kentucky Coal Co.* v. *Walling* (153 F. (2d) 152 (C.A. 6)). * * * [95 Cong.Rec. 14874-75, see also H.Rept. No. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14928-29]

The decisions subsequent to the 1949 amendment have recognized the continuing effect of this line of cases. *Mitchell* v. *Mercer Water Co.*, 208 F.2d 900 (C.A. 3); *Mitchell* v. *Moberly Fuel Co.*, 12 WH Cases 848, 30 Lab. Cases, para. 69,933 (E.D. Mo., 1956 not officially reported); cf. *Mitchell* v. *Dooley Bros., Inc.*, 286 F. 2d 40 (C.A. 1), certiorari denied, 366 U.S. 911.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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